Evidence to the Independent Human Rights Act Review

The United Kingdom Administrative Justice Institute and the Human Rights Centre

University of Essex

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A. Introduction

1. This evidence is submitted jointly by the UK Administrative Justice Institute and the Human Rights Centre at the University of Essex.[1] The UK Administrative Justice Institute (UKAJI) was established in 2014 with initial funding from the Nuffield Foundation to support the expansion of empirical research on administrative justice in the UK. UKAJI now focuses on the operation of administrative justice mechanisms; encouraging good early decision-making; efficiency and effectiveness of administrative justice systems; access to justice; and enforcement and outcomes.[2]

2. Since being established in 1983 the Human Rights Centre at Essex has gained a global reputation for excellence in the promotion of world-leading interdisciplinary human rights education, research and practice. It is now one of the world's largest single academic human rights communities. At the heart of its work is the interface between the theory and practice of human rights domestically and globally.[3]

3. We are pleased to see the Government's commitment to remaining a signatory to the European Convention on Human Rights and in this context agree that a review of the operation of the Human Rights Act 1998 (HRA) is appropriate. The review will provide a timely opportunity to ensure that the HRA provides an effective legal framework for ensuring the protection of human rights in the UK.

4. We also welcome the transparency, accessibility, and engagement involved in the Review on these important matters.

5. In this submission we concentrate on three aspects:
   - the scope of the current Review;
   - s2(1) HRA; and
   - the risks of 'over-judicialising' public decision-making.

[1] The evidence has been authored by Professor Maurice Sunkin QC (Hon); Lee Marsons; Dr Koldo Casla; and Professor Theodore Konstadinides. We are grateful for the help provided by others, including; Dr Andrew Fagan; Professor Simon Halliday; Professor Jeff King; Dr Daragh Murray, Dr Joe Tomlinson, Dr Stephen Turner, and Dr Gus Waschefort. None of those who helped are responsible for the content of this evidence.
[2] https://ukaji.org/
[3] https://www.essex.ac.uk/centres-and-institutes/human-rights

B. The Scope of the Review

6. While we understand that given the time and resource constraints available to the Review it is impossible to cover all the potentially important relevant considerations. However, the limited focus of the Review is likely to significantly reduce the overall value of the exercise. Three matters are of particular importance.

a) The failure to consider the rights themselves

7. The failure to consider the rights themselves will significantly limit the Review's ability to address the substantive content and scope of human rights protection provided by the HRA. It may also limit the Review's ability to explore the wider constitutional effects of the HRA.

8. There are significant gaps in the rights which are currently protected under the HRA, for example there is no explicit protection of social and economic rights, environmental rights, and only partial protection of equality and non-discrimination rights. These limits arise largely because when the European Convention on Human Rights was drafted this fuller range of rights was not recognised as they are today. One consequence is that legitimate rights claims concerning such issues may be forced into a rights framework that is not best suited to deal with the matters raised. This may add to the complexity of litigation and the jurisprudence which may in turn impact upon the effects of the HRA.

9. The operation of the HRA is affected by the nature of the rights involved. For example, where rights are absolute they cannot be infringed whatever justifications the government or other public authorities provide. In other situations the circumstances where infringements are possible will vary between rights. This means that questions of concern to the Review, including the appropriate relationships between the courts, Parliament and the executive may not be fully considered without regard to the scope and nature of the particular rights at issue.

10. It appears that the Review will not consider whether the HRA has enhanced the protection of rights in the UK when compared with the previous common law position. While there have been comments from the Supreme Court that the HRA and common law provide equivalent protection for some of the qualified rights[4], there have also been cases indicating that this is not always true in practice. In *R (Miller) v College of Policing* [2020] EWHC 225 (Admin), for instance, Julian Knowles J. found that a police officer's visit to the claimant's workplace in connection with a tweet critical of transpeople violated Art 10 of the ECHR but did not breach relevant common law standards. Therefore, the

[4] *Kennedy v Charity Commission* [2014] UKSC 20.

Review may ignore, or obscure, the wider benefits of the HRA for rights protection.

11. Finally, in this context, it also appears that the Review will not engage with the consequences of Brexit for fundamental rights protection in the UK. The decision to not retain the EU Charter of Fundamental Rights (which includes "third generation" fundamental rights such as data protection, guarantees on bioethics and transparent administration) will inevitably reduce the scope of fundamental rights protection.[5] Brexit will also impact on the quality and extent of judicial review of legislation since according to s 5 of the EU (Withdrawal) Act 2018 (EUWA) the primacy of the Charter's provisions is no longer recognised in domestic law.[6] The courts can no longer disapply UK primary law which breaches the rights under the Charter.[7] This significantly diminishes the scope and level of rights protection, as well as the role of the courts. In so doing it is likely to highlight the future importance of the HRA.

b) The separation between Judicial Review and the Review of the HRA

12. It is unfortunate that this Review and the Independent Review of Administrative Law (IRAL) are being undertaken separately and with little, if any apparent, coordination. Judicial review is the primary means by which the HRA is enforced in the UK and many of the issues considered by the IRAL are of direct significance to the current Review. [8] Access to the courts to enforce the duties in s 6 of the HRA is the most obvious example where overlapping issues arise, but the overlap is far more extensive. It includes the grounds of judicial review, especially the nature of common law rights; arguments based on proportionality; issues concerning justiciability; large issues concerning the overall relationship between courts and executive discretion and policy; as well as questions concerning the appropriate balance between the interests of individuals and the wider public interest. Such matters infuse judicial review and the effects of the HRA.

13. Later we discuss the risk of 'over-judicialisation', an issue which raises important and difficult questions concerning how public authorities perceive and

[5] This includes new rights such as the 'right to be forgotten' as developed by the Court of Justice of the EU.
[6] The fundamental rights guaranteed as general principles of EU law constitute 'retained EU law' in accordance with s 4 of the EUWA 2018. This is not to be interpreted as meaning that all rights contained in the Charter are recognised as general principles of EU law. In any case, Para 3 of Schedule 1 of the EUWA 2018 limits the use of general principles so that they do not provide a right of action for potential litigants, but merely constitute an aid to interpretation of other retained EU law.
[7] *Benkharbouche* [2017] UKSC 62.
[8] On the link between judicial review and human rights arguments, see Joint Committee of Human Rights, *Enforcing Human Rights*, Tenth Report of Session 2017-19 (July 2018) paras 75-78. See also UKAJI's submission to the IRAL, 20 October 2020. Available at: https://ukaji.org/2020/10/20/ukajis-submission-to-the-independent-review-of-administrative-law-iral/ (accessed 2 March 2021)

respond to litigation. It is not at all clear whether, and if so, how public authorities distinguish between matters arising under the HRA and judicial review issues more generally. Even when such divisions are clear to lawyers, they may appear artificial to public authorities. The division between the work of the IRAL and that of the current Review is a missed opportunity to look across judicial review and human rights in a coherent and cohesive manner.

c) The focus on the HRA in the courts

14. As the British Institute of Human Rights has noted,[9] the focus of the Review is on the operation of the HRA in the courts. It is therefore likely to omit consideration of the broader effects of the HRA. An important objective of the HRA was to inculcate a culture of human rights across government and public authorities so that people need not rely on the courts to protect their rights. In enacting the HRA, Parliament's intention was that questions of rights, proportionality, and minority interests should not be left exclusively to judges and litigation, but should be considerations built into day-to-day public administration and policy formulation processes, as well as strategies for wider education and increasing public awareness of rights issues.[10] As the Joint Committee on Human Rights has said:

> Access to a court is an essential backstop for human rights; without legal jeopardy there is impunity for those who might abuse another's human rights. However, in most cases this should be the last resort not the first. The most effective and efficient way to enforce human rights is to design and implement systems and laws that uphold human rights at the outset. A culture which understands and respects human rights is a necessary pre-condition for this.[11]

15. Whether the HRA is effective in this broader sense is an extremely important question that will not be properly addressed by a review that focuses only on the courts. This is an issue to which we return when we consider the fear of 'over-judicialisation'.

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[9] https://www.bihr.org.uk/ihrar-bihr (accessed 9 February 2021).

[10] Joint Committee on Human Rights, 'Building a human rights culture' (32nd Report 7 November 2006). Available here: https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27810.htm (accessed 6 February 2021). https://ukaji.org/2021/01/14/ukaji-call-for-blogs-on-the-independent-human-rights-act-review-ihrar/ (accessed 9 February 2021).

[11] Joint Committee of Human Rights, *Enforcing Human Rights*, Tenth Report of Session 2017-19 (July 2018) para 6.

C. The section 2(1) duty to "take into account" the jurisprudence of the ECtHR

16. The wording of the duty in s.2(1) 'to take account of' Strasbourg jurisprudence was carefully chosen in order to make it clear that domestic courts "always have a choice…[and] …must decide the case for itself."[12] This is despite Art 46 ECHR which provides for the legal obligation of the UK (but not UK judges) to abide by ECtHR decisions in any case to which it is a party.

17. Lord Irvine, who as Lord Chancellor was responsible for seeing the HRA through Parliament, reminds us that Parliament rejected amendments which sought to restrict the freedom of our courts including Lord Kingsland's amendment seeking to impose an obligation on domestic courts to follow Strasbourg.

18. Parliament's intention was clear: domestic courts should be bound to consider Strasbourg jurisprudence but not bound to follow that jurisprudence. For the most part domestic judges have taken this approach,[13] although they have indicated that the weight to be attached to decisions of Strasbourg may vary depending on the circumstances.

19. Where the Strasbourg court has developed a "clear and constant line of jurisprudence" domestic courts will normally decide to follow that line of jurisprudence.[14] Likewise, substantial weight may be given to a carefully considered recent decision of the Grand Chamber on the relevant issues.[15] By contrast, a decision of the ECtHR that is considered to be at odds with fundamental provisions of the common law or which is considered to pay insufficient attention to the domestic procedures will be given significantly less weight.[16] There is also evidence that, even where these factors are not in play, the Supreme Court is prepared to depart from Strasbourg authority where it disagrees with that authority on principle.[17]

20. The prevailing approach, then, accords with Parliament's intention that domestic courts have a duty to take account of Strasbourg case law but have freedom to depart from the jurisprudence of the ECtHR when they consider it appropriate to do so. This reflects Parliament's intention that UK judges should be free to decide how Convention Rights – those rights created in domestic law by the HRA - should be applied domestically. In this sense s 2(1) reinforces both Parliament's objectives and broader notions of the UK's sovereign

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[12] Lord Irvine, 'A British Interpretation of Convention Rights' [2012] *Public Law* 237, 239.

[13] In *AF v Secretary of State for the Home Department* [2004] UKHL 56, Lord Hoffmann, para [70], while disliking a decision of the ECtHR considered that the House of Lords was, in reality, bound to apply it. Lord Rodger agreed with him. See also *Cadder v Her Majesty's Advocate* [2010] UKSC 43.

[14] Lord Neuberger in *Pinnock v Manchester City Council* [2011] UKSC 6.

[15] *Chester v Secretary of State for Justice* [2013] UKSC 63.

[16] *R v Horncastle* [2009] UKSC 73.

[17] *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2.

independence. As intended, it also enables domestic courts to inform the development of jurisprudence at the international level.[18]

UK's compliance with its international human rights obligations

21. One implication of the wording of s.2(1) as generally applied is that domestic courts can depart from Strasbourg jurisprudence to produce outcomes which may result in non-compliance with the UK's Treaty obligations. People will differ on the importance of this. Lord Irvine's view is that judicial decisions should not be driven by concern to ensure compliance with international duties. His view is that compliance with international treaty obligations is a matter for Parliament and the executive and not the courts bearing in mind that Parliament can intervene when a domestic judgment is considered to be contrary to treaty commitments and that victims of rights violations can go to Strasbourg.[19]

22. Others stress the importance of international compliance, especially compliance with international human rights obligations. They say that respect for international treaty obligations is fundamental to the rule of law;[20] that the UK should consider itself to be a leader and a model for other states to emulate; and that it should therefore do all it can to ensure compliance with international law and especially international human rights obligations. We strongly agree with this approach.

23. Judges, of course, can be expected to understand the importance of these considerations and the need to factor them in when deciding whether or not to follow Strasbourg case law. However, this is a matter which should not be left exclusively to judges. The duty to respect international human rights obligations is a foundational principle and given that the HRA looks beyond the courts there is a case for this principle to be expressly set out in the HRA. This will show that Parliament and the executive recognise the importance of this principle. It will also make it clear that this principle is a factor to be considered by the courts when considering whether to depart from Strasbourg jurisprudence.

24. **The duty in s.2(1) to 'take into account' Strasbourg jurisprudence should be retained. However, reference to the duty to have regard to the general principle that domestic law accords with the UK's international human rights obligations should be inserted.**

[18] Indeed, when *Horncastle* appealed to Strasbourg, no violation of Article 6 was found on the basis of the Supreme Court's analysis: *Horncastle v United Kingdom* (Application No 4184/10) 16 December 2014.
[19] Lord Irvine, 'A British Interpretation of Convention Rights' [2012] *Public Law* 237, 239.
[20] Thomas Bingham, *The Rule of Law* (Penguin Books 2011).

D. The risks of 'over-judicialising' public administration

25. The Review raises concern that the HRA has generated a risk of 'over-judicialising' public administration. While it is unclear exactly what the Review means by this, we take the reference to 'over-judicialising' to express concern that public bodies are being required to alter their way of working and to adopt procedures more appropriate to a court or judicial process. In addition, we take the Review to mean that the HRA may have extended the ability of the courts to interfere with policy or administrative decisions in a way which is undesirable. It may be noted that in passing that such concerns were not expressed by the government when the HRA was reviewed by the Equality and Human Rights Commission after the first ten years or so of its operation.[21]

26. It is clearly important that the Review base recommendations on solid empirical evidence. At present there appears to be little empirical evidence on whether, to what extent, and with what consequences, the HRA is resulting in the 'over-judicialisation' of public administration in general.

The absence of a culture of human rights protection

27. If 'over-judicialisation' is indeed occurring it may be the result of a conscientious willingness of public administration to adopt human rights compliant approaches. However, there is another rather different risk, namely that public administration, or at least parts of public administration, have yet to adapt in any meaningful way. The Joint Committee on Human Rights, for instance, flagged up the approach of the Home Office to the Windrush saga as an example of this:

> The Home Office's approach to, and handling of, Windrush immigration cases suggests a culture in the Home Office that is not aware of s 6 and not informed by a human-rights based approach.[22]

28. The concern here, then, is not that the HRA is causing public administration to adopt procedures which are unsuitable. It is that the HRA, even after over twenty years, is still not leading to significant change in the culture and systems of public administration. This concern is at least as important as the risk of 'over-judicialisation', and we would argue that it is substantially more important. It is certainly a matter that warrants careful investigation.

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[21] There is no mention of such a risk in the government's response to the review of the Human Rights Act undertaken by the Equality and Human Rights Commission in 2009 https://www.equalityhumanrights.com/en/our-human-rights-work/human-rights-inquiry-2009.

[22] Joint Committee of Human Rights, *Enforcing Human Rights*, Tenth Report of Session 2017-19 (July 2018) para 155.

Public law and human rights litigation may benefit public administration

29. It is widely assumed, including within Government, that public law and human rights litigation has various adverse impacts on the quality of public administration. However, from an evidence-based perspective it cannot be assumed that the effects of public law and human rights litigation are necessarily negative.

30. Research, for example, has suggested that judicial review of local authority decisions leads to improvements in the quality of local government and the services provided.[23] The research found that improvements in quality occur for a variety of reasons including: by encouraging local authorities to reconsider their processes and policies; by requiring them to focus on particular needs and on members of the communities who may have been overlooked or paid insufficient attention; and by refocusing spending priorities to better comply with statutory duties. The findings challenge assumptions that forcing public bodies to follow procedures which are rooted in common law concepts of fairness or human rights requirements are at odds with the requirements of good administration. This, of course, is a point that was well made by Sir John Donaldson when in *R v Lancashire County Council ex parte Huddleston* he referred to the partnership between the judges and administration "based on a common aim, namely the maintenance of the highest standards of public administration". [24]

31. **There is a need for more empirical research on how the HRA affects public administration. Existing research suggests that public law and human rights litigation helps public bodies to improve the quality of their decision-making and the quality of their service delivery. It cannot be assumed that public law and human rights litigation has a negative effect on public administration in general.**

The need for human rights compliant procedures

32. Aside from the empirical evidence there are strong arguments for ensuring that public administration adopts procedures that are fair and satisfy human rights requirements. Such procedures are likely to contribute to the quality of decisions and to confidence in the system. Such factors, of course, are well known to judges and have been stressed many times, see for example, Lord Reed's explanation of why fairness matters in *Osborne v Parole Board of England and Wales*. [25]

33. More particularly in the context of the HRA there have been concerns regarding how public bodies should approach issues of proportionality. In *Begum v Denbigh High School*, the Court of Appeal held that the school governors had

[23] Maurice Sunkin, Lucinda Platt and Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales' (2010) 20 *Journal of Administration Research and Theory* i243-i260 (2010); Maurice Sunkin and Varda Bondy, 'The Impacts of Judicial Review and Effective Redress' in *Public Law Adjudication in Common Law Systems: Process and Substance*, Joanna Bell, Mark Elliott, Philip Murray and Jason Varuhas eds., Hart Publishing.

[24] [1986] 2 All ER 941, at 945.

[25] [2013] UKSC 61.

failed to adopt a structure to their decision-making that ensured proper consideration of whether their decision to enforce their school uniform policy was a proportionate infringement of rights to religion under Art 9 ECHR. The Court of Appeal's decision was criticised by Thomas Poole, essentially on the grounds that the court had been more concerned with the procedure than the substance of the rights at stake. He wrote that the Court of Appeal's approach rests on:

> [A] basic mistake. Proportionality is a [test] to be applied by the court when reviewing decisions of public authorities after they have been made […] It is not a test which ought to mean that public authorities should themselves adopt a proportionality approach to the structuring of their decision-making.[26]

34. In the House of Lords, agreeing with Poole, Lord Bingham said that:

> I consider that the Court of Appeal's approach would introduce 'a new formalism' and be 'a recipe for judicialisation on an unprecedented scale.' The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.[27]

35. Not all agree with this. David Mead has offered three telling criticisms of Lord Bingham's approach.

> First, *Denbigh* effects a shift towards court-based enforcement and judicial protection, away from protection by those […] on whom discretionary political power is conferred. […] An internalised, prospective process-driven model of human rights protection creates—or at least has the potential to create—human rights equally for all. That is its beauty. The judicial enforcement of fair procedures, where decision-makers know they must ask the right questions in the right order for the right reasons should mean that your rights are as well protected as mine: protection is systemic and institutionalised. In contrast, a system in which outcomes are all means that aggrieved citizens must pursue individualised one-off legal remedies to protect their rights, with the costs of enforcement and protection shifted onto them. […]
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> Secondly, the House of Lords has removed any incentive for decision makers to reach decisions by a process that is Convention-sensitive. Why not just toss a coin? For a decision to survive scrutiny, a decision-

[26] Thomas Poole, "Of headscarves and heresies: The *Denbigh High School* case and public authority decision making under the Human Rights Act" [2005] Public Law 685, 689-691.
[27] [2006] UKHL 15.

> maker needs only to demonstrate that the decision is what a panel of judges at some time in the future considers to be proportionate.
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> Thirdly…[c]hanging public service culture to one where human rights discourse permeates thinking at all levels was one of the government's avowed intentions in introducing the HRA. That objective is supported by process-based review but stunted by *Denbigh*."[28]

36. With respect to the approach taken by Lord Bingham, we agree with Mead on these matters. While it is clearly not appropriate to force public administration to adopt the full panoply of court processes it is important to ensure that appropriate procedures are used to decide rights issues because procedures affect the many. It is important to ensure that infringements of rights are proportionate when decisions are made and not just by a court at some point after rights have been infringed. It is important for decision-makers to understand the need for proper protection of human rights because it is only when they do so that the aim of the HRA in creating a culture of rights throughout public administration can be achieved. This is not a matter of simple formal or 'tick box' compliance. The need is for procedures that enable, and show conscientious respect for, rights protection.

E. The HRA and policy: some comments

37. One of the main reasons why the government is interested in reviewing the HRA is concern that the Act has led courts to become overly interventionist and far too ready to interfere in matters that should fall exclusively within the province of Parliament or the executive. We do not consider such concern to be justified. The courts are very sensitive to the risk of trespassing into the executive or legislative domains. Where the precise territorial lines have been drawn has varied over time, has been dependent on context, and has differed as between judges. However, the prevailing approach is one of caution and in our view there is no reason to fundamentally alter the HRA to meet concerns regarding judicial overreach.

38. A further consideration is that restricting our courts competence to hear matters regarding policy decisions may in fact relinquish a measure of control and responsibility to the Strasbourg Court. This is as a result of three factors: that the Strasbourg Court would not have the opportunity to consider the legal reasoning of our courts; the Strasbourg Court may more readily be seized of matters where the jurisdiction of domestic courts is restricted; and restricting the jurisdiction of domestic courts may preclude the admissibility requirement that domestic remedies be exhausted, thus facilitating access to the Strasbourg Court.

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[28] D. Mead, 'Outcomes aren't all: Defending process-based review of public authority decisions under the Human Rights Act' [2012] Public Law 61, 76-8.

39. While it is difficult to be exhaustive, examples of areas where the courts have indicated that they are likely to show substantial deference to executive decisions include cases involving: policy choices dependent on party politics or political philosophy;[29] broad questions of economic and social policy;[30] welfare policy;[31] issues involving the allocation of finite public resources;[32] questions involving national security and immigration;[33] foreign affairs and diplomatic relations;[34] and policy preferences in the area of social security and welfare.[35]

40. Amongst the most difficult questions in recent years have been those involving national security issues and welfare benefits and related social and economic policy. In relation to national security the recent decision of the UK Supreme Court in *Begum v Secretary of State for Home Department* makes it clear that the Supreme Court will defer to the executive regarding assessments on matters of national security and public safety.[36]

41. In the context of welfare policy there has been much litigation questioning decisions of the executive and legislation relying on the right to private and family life (Art 8 ECHR), the principle of non-discrimination (Art 14 ECHR), and the right to private property (insofar as benefits fall under Art 1 First Protocol ECHR). For the most part the challenges have been unsuccessful and have not significantly interfered with the substance of policy. The overriding conclusion is that in these cases, as in the context of national security, the judges have been extremely cautious and sensitive to the perceived limitations of their role. Certainly the cases do not indicate any significant 'over-judicialisation' of this area of policy. An important recent case in this regard is *R (DA) v Secretary of State for Work and Pensions*, where the Supreme Court determined that in relation to any claim for a right to welfare benefits under the HRA, the appropriate test is whether any discrimination suffered by a claimant was manifestly without reasonable foundation. If it did not reach this high threshold, there would be no successful human rights claim.[37] This does not mean that attempts to protect rights are never successful,[38] but successful cases are rare. Far from indicating that the HRA has led judges to use human rights law to undermine government policy the decisions highlight the limited reach of the HRA in this field.

42. The general situation was summarised by Lord Reed when he explained that the HRA:

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[29] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [75]-[76].
[30] *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at [70].
[31] *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16.
[32] *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617 at [41].
[33] *Rehman v Secretary of State for Home Department* [2003] 1 AC 153.
[34] *R (Lord Carlile) v Secretary of State for Home Department* [2014] UKSC 60.
[35] *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73.
[36] [2021] UKSC 7.
[37] [2019] UKSC 21.
[38] *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58 related to the cap on housing benefit payments and its discriminatory consequences for disabled children.

> [E]ntails some adjustment of the respective constitutional roles of the courts, the executive and the legislature, but does not eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their accountability and their legitimacy. It therefore does not alter the fact that certain matters are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as matters of that nature have to be considered by the courts when deciding whether executive action or legislation is compatible with Convention rights, that is something which the courts can and do properly take into account, by giving weight to the determination of those matters by the primary decision-maker." [39]

43. More recently Lady Hale in her dissenting judgment in *DA*, observed that there is a need for delicacy in the approach to be taken by the courts:

> The delicacy arises because these are cases about equality in an area, not principally of social policy, but of economic policy. Constitutionally, economic policies are decided by those organs of government which are directly accountable to the people. The courts cannot make those decisions for them. But that does not mean that the courts have no role to play. In a constitution which respects and protects fundamental rights, it is the role of the courts to protect individuals from unjustified discrimination in the enjoyment of those fundamental rights. There are no "no go" areas. [40]

44. These statements are by judges who may have different individual views about where the precise boundaries should be drawn. However, they illustrate a fundamental judicial consensus regarding where ultimate responsibility for national security and economic and social policy resides in our constitution: within the executive and legislature, with the courts playing a subsidiary role only on matters touching on rights.

45. **The HRA has not fundamentally altered the constitutional relationships between the courts, the legislature and the executive and we do not consider there to be a need to revise the overall structure of this important piece of legislation.**

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[39] *R (on the application of SG and others (previously JS and others)) (Appellants) v Secretary of State for Work and Pensions (Respondent)* [2015] UKSC 16, para [92].

[40] *R (DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21, at para [133].

F. Summary and conclusions

- Given the Government's commitment to remaining a signatory to the European Convention on Human Rights we agree that a review of the operation of the Human Rights Act 1998 (HRA) is appropriate.

- However, the limited focus of the Review is likely to reduce the overall value of the exercise. There are three matters in particular that are of importance. It is unfortunate that the review will not consider the content of rights themselves; that the review is being undertaken with little if any apparent coordination with work of the Independent Review of Administration; and that the focus of the Review is on the effect of the HRA on the courts rather than the wider effects of the HRA including on public administration.

- The duty in s 2(1) HRA, to 'take into account' Strasbourg jurisprudence should be retained. However, reference to the duty to have regard to the general principle that domestic law accords with the UK's international human rights obligations should be inserted.

- There is a need for more empirical research on how the HRA affects public administration.

- Existing research indicates that it cannot be assumed that public law and human rights litigation has a negative effect on public administration in general. On the contrary research suggests that public law and human rights litigation helps public bodies to improve the quality of their decision-making and the quality of their service delivery.

- There is a need to improve the ability of the HRA to inculcate a culture of human rights protection across public administration and to overcome challenges in this regard.

- The procedures adopted by public administration must be fair and human rights compliant.

- The HRA has not fundamentally altered the constitutional relationships between the courts, the legislature and the executive and we do not consider there to be a need to revise the overall structure of this important piece of legislation.